

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OCT 11 2002

In the Matter of

Domestic Section 214 Application for
Authorization Filed for Acquisition of
Assets of Cable & Wireless USA, Inc.
By Primus Telecommunications, Inc.

WC Docket No. 02-308

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS

APCC Services, Inc.; Data Net Systems, L.L.C.; Jaroth, Inc. d/b/a Pacific Telemanagement Services; Intera Communications Corporation, and Davel Communications, Inc. (collectively, "Commenters") hereby file these comments on the proposed transfer of Cable & Wireless USA, Inc.'s ("Cable & Wireless") domestic interstate, interexchange customer base to Primus Telecommunications, Inc. ("Primus"). As shown below, Cable & Wireless is engaged in ongoing violations of the Communications Act of 1934, as amended ("Act"), and the Commission's rules. Pursuant to Section 63.03 of its rules, the Commission should remove the above-captioned application ("Application") from streamlined processing until those violations are addressed and resolved. 47 C.F.R. § 63.03(c)(4). Alternatively, if the Commission believes it is appropriate to grant the Application, it should do so only on the condition that the parties to the Application (i) specify which among them is liable for the damages owed to Commenters as a result of Cable & Wireless' violations; and (ii) certify that the liable party shall hold and retain the call detail records necessary to calculate the amount of those damages and that it possesses sufficient revenue to pay the damages.

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I. STATEMENT OF INTEREST

Commenters are each payphone service providers (“PSPs”) and/or the agents of PSPs for the billing and collection of dial-around compensation. Dial-around compensation refers to the payments that interexchange carriers (“IXCs”), including Cable & Wireless, are required, pursuant to Section 276 of the Act and the Commission’s rules, to make to PSPs for certain categories of completed coinless calls originating from payphones. *See* 47 U.S.C. § 276; 47 C.F.R. § 64.1300.¹

II. DISCUSSION

A. Cable & Wireless Is Engaged in Ongoing Violations of the Act and the Commission’s Rules

Cable & Wireless has violated and is violating Section 276 and the Commission’s rules by its continuing failure to compensate Commenters for each and every compensable call made from their payphones, as required by 47 C.F.R. § 64.1300. Commenters have filed a complaint in the United States District Court for the District of Columbia seeking recovery of the damages owed to them by Cable & Wireless. *APCC Services, Inc., et al. v. Cable & Wireless, Inc.*, No. 1:02CV158. (A copy of the complaint is attached.) The case is pending.

Commenters preliminarily estimate, based on independent call completion data, that Cable & Wireless has, to date, failed to pay Commenters approximately \$4,000,000, exclusive of

¹ Section 64.1300(a) states “[e]xcept as provided herein, the first facilities-based interexchange carrier to which a completed coinless access code or subscriber toll-free payphone call is delivered by the local exchange carrier shall compensate the payphone service provider for the call at a rate agreed upon by the parties by contract.” 47 C.F.R. § 64.1300(a). Subsection (c) provides that “[i]n the absence of an agreement as required by paragraph (a) of this section, the carrier is obligated to compensate the payphone service provider at a per-call rate of \$0.24.” 47 C.F.R. § 64.1300(c).

interest. At a per-call rate of \$.024, that amount represents over 16,000,000 separate violations of the Act and the Commission's rules.

B. The Commission Should Remove the Application from Streamlined Processing

In light of Cable & Wireless' ongoing violation of the Act and the Commission's rules, the Commission should, pursuant to Section 63.03, remove the Application from streamlined processing. 47 C.F.R. § 63.03(c)(4); *see Notice of Removal of Section 214 Application from Streamlined Treatment*, Public Notice, DA 02-2430 (Sept. 26, 2002) (removing a Section 214 transfer application from streamlined processing due to pending charges of violations of the Commission's rules). Removing the Application From streamlined processing will allow the Commission to carefully evaluate whether Cable & Wireless' violations should preclude grant of the Application.

It is all the more critical that the Commission take sufficient time to evaluate the violations because grant of the Application may substantially hinder Commenters' efforts to resolve Cable & Wireless' violations and recover the damages owed to them. The Application states only that Cable & Wireless seeks to transfer to Primus "its existing interstate, interexchange customer base" Application at 2. It offers no information as to whether Primus will also acquire the associated assets and liabilities. This raises a number of troubling scenarios. For example, if Primus acquires the customer base and the associated revenue stream, but does not also acquire Cable & Wireless' liabilities with respect to dial-around compensation, Commenters could potentially be left with a claim against an empty Cable & Wireless shell entity. Alternatively, if Primus acquires both the assets and the liabilities associated with the payment of dial-around compensation, but Cable & Wireless either retains or destroys the

associated call records, it could make it significantly more difficult or complicated for Commenters to prove their case.

C. The Application Should Be Granted Only Subject to Appropriate Conditions

Alternatively, if the Commission believes it is appropriate to continue to review the Application under streamlined procedures, it should, at a minimum, impose conditions on the grant of the Application to ensure that it remains possible to resolve Cable & Wireless' violations. Specifically, the Commission should require the parties to specify whether the liability associated with Cable & Wireless' failure to pay dial-around compensation is being transferred to Primus. The Commission should further require that whichever party will hold the liability shall also hold and retain any and **all** call records currently in Cable & Wireless' possession relevant to the calculation of the damages owed to Commenters. Finally, the Commission should require whichever party will hold the liability to certify that it will have sufficient revenue to pay any damages that are owed to Commenters.

III. CONCLUSION

For the reasons shown above, the Commission should remove the Application from streamlined processing or, in the alternative, grant the Application only subject to the conditions set forth herein.

Respectfully submitted,



/s/ Jacob S. Farber

Jacob S. Farber

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Counsel for Commenters

October 11, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APCC SERVICES, INC.,
as assignee of *the* claims of and attorney-
in-fact for the entities listed in Exhibit A,
10306 Eaton Place, Suite 520
Fairfax, VA 22030,

DATA NET SYSTEMS, L.L.C.,
as assignee of the claims of and attorney-
in-fact for the entities listed in Exhibit B,
1608 Barclay Boulevard
Buffalo Grove, IL 60089,

JAROTH, INC. d/b/a PACIFIC
TELEMANAGEMENT SERVICES.
as assignee of the claims of and attorney-
in-fact for the entities listed in Exhibit C,
14472 Wickes Boulevard
San Leandro, California 94577

INTERA COMMUNICATIONS CORPORATION,
as assignee of the claims of and attorney-
in-fact for the entities listed in Exhibit D,
6920 Koll Center Parkway, Suite 211
Pleasanton, CA 94566; and

DAVEL COMMUNICATIONS, MC.,
as assignee of the claims of and attorney-
in-fact for the entities listed in Exhibit E,
10120 Windhorst Road
Tampa, FL 33619,

Plaintiffs,

v.

CABLE & WIRELESS, INC.
8219 Leesburg Pike
Vienna, VA 22812,

Defendant.

CASE NUMBER 1:02CV00158

JUDGE: Ellen Segal Huvelle

DECK TYPE: General Civil

DATE STAMP: 01/29/2002

COMPLAINT

JURY DEMAND

SERVE: Corporation Service Co.
1090 Vermont Ave., N.W
Washington, D.C. 20005
Registered Agent

Plaintiffs bring this Complaint ("Complaint") against Defendant Cable & Wireless, Inc. ("C&W") to collect compensation owed by C&W under federal law and for other relief, including an order directing C&W to comply with federal law, accountings of the sums owed by C&W, interest, costs, and attorneys' fees as provided by law. Plaintiffs state **as** follows:

Summary of Complaint

1. This action is brought by Plaintiffs on behalf of hundreds of entities that own and operate over 400,000 public payphones located throughout the United States. The Plaintiffs, known in the telecommunications industry as independent payphone service providers, bring this action to collect compensation that Defendant C&W currently owes the Plaintiff independent payphone service providers for completed access code and toll free calls that have been made since October 1, 1998 using Plaintiffs' payphones and carried over C&W's telephone network facilities. C&W is required to pay to the Plaintiff independent payphone service providers compensation for each such call, as prescribed by the Federal Communications Commission ("Commission" or "FCC"), under the rules, regulations, and orders issued by the FCC pursuant to Section 276 of the Communications Act of 1934, as amended ("Act"). 47 U.S.C. § 276. C&W is violating the orders of the FCC governing the method for determining the number of calls for which C&W's payment is due to the Plaintiff independent payphone service providers and is *failing* to compensate the Plaintiff independent payphone service providers for each **and** every completed access code and toll free call using Plaintiffs' payphones and carried over C&W's telephone network facilities.

The Parties

7. Plaintiff APCC Services, Inc. (“APCCS”) is a Virginia corporation with its principal place of business in Fairfax, Virginia. APCCS is the duly authorized billing and collection agent, assignee of the claims of, and attorney-in-fact for several hundred independent payphone service providers for purposes of collecting compensation from Defendant C&W and other carriers. A list of names and addresses of the independent payphone service providers on whose behalf APCCS brings this action is appended as Exhibit A to this Complaint.

3. Plaintiff Data Net Systems, L.L.C. (“Data Net Systems”) is an Illinois limited liability company with its principal place of business in Buffalo Grove, Illinois. Data Net Systems is the duly authorized billing and collection agent, assignee of the claims of, and attorney-in-fact for 96 independent payphone service providers for purposes of collecting compensation from Defendant C&W and other carriers. A list of the names and addresses of the independent payphone service providers on whose behalf Data Net Systems brings this action is appended as Exhibit B to this Complaint.

4. Plaintiff Jaroth, Inc. d/b/a Pacific Telemanagement Services (“Pacific”) is a California corporation with its principal place of business in San Leandro, California. Pacific is the duly authorized billing and collection agent, assignee of the claims of, and attorney-in-fact for three independent payphone service providers for purposes of collecting compensation from Defendant C&W and other carriers. A list of the names and addresses of the independent payphone service providers on whose behalf Pacific brings this action is appended as Exhibit C to this Complaint.

5. Plaintiff Intera Communications Corporation (“Intera”), formerly NSC Telemanagement Corporation, is a Delaware corporation with its principal place of business in Pleasanton, California. Intera is the duly authorized billing and collection agent, assignee of the claims of, and attorney-in-fact for 13 independent payphone service providers for purposes of collecting compensation from Defendant C&W and other carriers. A list of the names and addresses of the independent payphone service providers on whose behalf Intera brings this action is appended as Exhibit D to this Complaint

6. Plaintiff Davel Communications, Inc. (“Davel”) is a Delaware corporation with its principal place of business in Tampa, Florida. Davel is the duly authorized billing and collection agent, assignee of the claims of, and attorney-in-fact for two independent payphone service providers for purposes of collecting compensation from Defendant C&W and other carriers. A list of the names and addresses of the independent payphone service providers on whose behalf Davel brings this action is appended as Exhibit E to this Complaint.

7. The named parties in paragraphs 2 through 6 of this Complaint hereinafter are referred to collectively as “Plaintiffs”.

8. Defendant C&W is a Delaware corporation with its principal place of business in Vienna, Virginia. C&W resides, is found, and does business in the District of Columbia.

9. Defendant C&W is a common carrier of telephone calls and is subject to the compensation payment obligations mandated by Section 276 of the Communication Act of 1934, as amended, 47 U.S.C. § 276, and the related rules, regulations, and orders of the FCC.

Jurisdiction and Venue

11. This action arises under Sections 206 and 207 of the Act, 47 U.S.C. §§ 206 and 207, and the rules, regulations, and orders promulgated or issued by the FCC by authority of the

Act

12. This Court has jurisdiction over the subject matter of this action pursuant to 41 U.S.C. § 207 and 28 U.S.C. § 1331.

13. Venue in this District is proper pursuant to 28 U.S.C. § 1391 in that Defendant C&W resides in this District.

The Payphone Industry and Long-Distance Calling Services

14. Independent payphone service providers own, install, operate, manage, or maintain payphone services and facilities at various locations around the country, which enable callers to access the telephone network when away from their home or office. Plaintiff independent payphone service providers recover the cost of their payphone services and facilities by receiving payment for the use of those payphones either from callers or from carriers. Plaintiff independent payphone service providers compete with each other and with the payphones owned and operated by local telephone companies

15. Carriers, such as Defendant C&W, provide numerous and varied telephone service offerings, many of which can be used from payphones. The FCC has determined that carriers' access code and toll free calls constitute approximately one-third of the use of a payphone's services and facilities.

16. Carrier services using access codes enable a caller to use the telephone network and to pay for the call by means other than by paying for the call by depositing coins at the originating telephone. Typical billing arrangements include, but are not limited to, the use of calling cards, credit cards, prepaid cards, collect calls, and third-party calls. These services, such as "1-800-COLLECT", "1-800-CALL ATT" and "10-10-288", are frequently used by callers when away from their home or office telephones. From a payphone, the access code allows the

caller to reach the carrier's network to place a call without making any payment to the payphone service provider at the payphone itself. The carrier receives the payment for the call according to the particular payment method selected by the caller

17. Toll free services are sold by carriers to subscribers that desire to generate calls to the subscriber without any telephone charges to the originating caller. Also referred to as "subscriber 800" calls, such as "1-800-FLOWERS", subscribers use these services to encourage calls by customers or other parties interested in the subscriber. These services were commonly known by the "800" dialing prefix originally associated with them. Today, the popularity of these services has resulted in continued expansion such that toll-free numbers now include the "888", "877", "866" and "855" prefixes. Similar to access code calls, a caller using a payphone for a toll free call reaches the carrier's network without making any payment to the payphone service provider at the payphone itself. Carriers are paid by the subscriber for calls placed to that subscriber's toll free number.

Statutory and Regulatory Background

18. In February, 1996, the Telecommunications Act of 1996 became law and, in relevant part, directed the FCC to prescribe regulations that "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation". 47 U.S.C. § 276(b)(1)(A)

19. Pursuant to the Act, the FCC has promulgated rules and regulations and has issued orders that require carriers, including Defendant C&W, to pay compensation to independent payphone service providers for each and every compensable call. For the purpose

of compensation, a compensable call is a completed call made from a payphone where the caller utilizes a carrier other than the payphone's ~~presubscribed~~ carrier. Access code calls and toll free calls are two types of such calls

20. Pursuant to the Act, the FCC has promulgated rules and regulations and has issued orders establishing the per-call rate for all compensable calls. For all compensable calls made on or after October 7, 1997, the FCC initially set a rate of \$.284 per call. The FCC subsequently issued a report and order effective **April** 21, 1999 changing the going forward rate to 5.24 per call, which rate is currently in effect.

21. By regulation, the FCC requires each carrier, including Defendant C&W, to which a compensable call from a payphone is routed, to track or arrange for the tracking of each such call so that it may accurately compute the compensation it is required to pay to each payphone service provider. 47 CFR § 64.1310(a). Each carrier may use the tracking method of its choice.

22. The FCC regulations also provide that carriers and independent payphone service providers shall establish arrangements for the billing and collection of compensation for such completed calls. 47 CFR § 64.1310(b)

23. By order, the FCC requires each carrier to make payment of the compensation due independent payphone service providers at least on a quarterly basis.

24. Further, the FCC requires that a carrier which fails to make its compensation payment by the required due date should pay interest at the simple interest rate of 11.25% per year, accruing on its unpaid obligations from the date due until paid.

Billing and Payment Procedures

25. Under FCC-approved procedures adopted by the telecommunications industry,

independent payphone service providers, or the billing and collection agents for groups of independent payphone service providers (such as Plaintiffs *APCCS*, *Data Net Systems*, *Pacific*, *NSC*, and *Davel*) provide to carriers (such as Defendant *C&W*) on a calendar quarter basis a list of the telephone numbers of the payphones owned and operated by the independent payphone service provider or group of independent payphone service providers. The telephone number of a payphone also is referred to in the telecommunications industry as an “ANI” short for “Automatic Number Identification”. The payphone ANI is used by the carrier to identify the payphone from which a call originates

26. Under these billing and payment procedures, the list of payphone telephone numbers, or payphone ANIs, for which compensation is sought is then matched by the carrier to its records of compensable calls made during the calendar quarter. The carrier also may compare this list of ANIs to the list of ANIs provided by various telephone companies to authenticate that the ANIs submitted by the PSPs are payphones. The carrier is then required to remit payment for all of its compensable calls to the respective independent payphone service provider, or to the billing and collection agent for a group of independent payphone service providers, by the beginning of the next calendar quarter after the carrier receives the list of ANIs.

27. In addition to using the payphone ANIs in the billing process, the ANI is part of the data that precedes the transmission of the call in the network. The ANI may be used either while the call is taking place or afterwards to identify a compensable call. Attached to each electronically transmitted ANI is a two-digit code, commonly referred to as ANI “information indicator” digits, or ANI ii digits. The ANI information digits convey certain information about the telephone line on which a call is originating. For example, the digits “07” mean generally that the call is originating from a restricted telephone line. The sophisticated equipment used in

a telephone network often can “read” these **ANI** information digits, and may use them to switch and route calls, for example to an operator station for special handling.

28. With the advent of the payphone compensation requirements, the FCC required that, to be eligible for compensation, Plaintiff independent payphone service providers and local exchange companies must make available payphone specific ANI information digits, which for the payphones involved here are generally the ANI information digits “70.” To make this possible, local exchange companies, such as Verizon-Bell Atlantic, that provide telephone service to independent payphone service providers, are required to implement a software capability, known as Flex **ANI**, at the local exchange company’s switch on the Plaintiff independent payphone service providers’ payphone lines. Flex **ANI** makes it possible to provide the payphone specific coding digits “70”, so carriers, such as C&W, could use the equipment in their network(s) to specifically identify that the call is coming from a payphone for the purpose of tracking the call as a compensable call.

29. The FCC requires carriers, such as C&W, that wish to use Flex ANI to request, test, and coordinate with the local exchange companies to ensure there are no problems in providing or receiving the Flex **ANI** digits

30. Due to various FCC waivers granted to local exchange companies, Flex ANI would be implemented over a period of time, but not later than December **31**, 1998, and would become available at different payphones at different times. The FCC established special interim rules for determining compensation during the transition period involved in the implementation of **Flex ANI**.

31 For all of the Plaintiff independent payphone service providers’ payphone lines on which Flex ANI is not available at least thirty days before the beginning of the calendar quarter

during the transition period, C&W must use only one of *two* alternative bases for calculating the number of compensable calls for all such payphone lines for that quarter:

- a. C&W could pay on the actual number of completed C&W access code calls and **toll** free calls made on each payphone line, using whatever **tracking** capability it chose; or
- b. because Bell Operating Company payphones already generally had the capability to generate payphone specific ANI information digits, C&W could calculate the average number of completed C&W access code and toll free calls from the Bell Operating Companies' payphones that are able to provide payphone specific coding digits for that quarter and use that per payphone call average as the surrogate number of compensable calls for payment to independent payphone service providers.

32. Once Flex **ANI** is available on a Plaintiff independent payphone service provider's payphone line at least thirty days before the beginning of a calendar quarter, C&W is required to pay the required rate of compensation for all completed C&W access code calls and toll free calls based on the actual number of such calls from that payphone line

33. For the payphone lines without Flex **ANI**, in any single quarter C&W is prohibited from using a combination of the Bell Operating Companies' surrogate number for some calls, or some payphone lines, and the actual number of calls for other calls, or other payphone lines

Plaintiffs' Billing of C&W for Compensation

34. Pursuant to the FCC-approved procedures, Plaintiffs have submitted statements to Defendant C&W (and to all of its predecessor companies) for the payment of compensation for

each calendar quarter from October 7, 1997 through December 31, 1997 (“4th Quarter 1997”) through, and including, **April 1**, 2001 through June 30, 2001 (“2nd Quarter 2001”). Plaintiffs continue to submit statements to the Defendant C&W for the payment of compensation for each calendar quarter as it becomes due. Payments are due on the first day of the quarter after the following quarter (e.g., compensations for calls made during 4th Quarter 1997 became due on **April 1**, 1998).

COUNT 1

35. Plaintiffs incorporate herein paragraphs 1 through 34 by reference.

36. On Plaintiff independent payphone service providers’ payphone lines on which Flex ANI was available on or before March 1, 1998, C&W was required to pay Plaintiff independent payphone service providers for each and every completed C&W access code call and toll free call placed from their payphones during the 2nd calendar quarter of 1998.

37. On each Plaintiff independent payphone service provider payphone line on which Flex ANI was available at least thirty (30) days before the beginning of the next calendar quarter, C&W was required to pay Plaintiff independent payphone service providers for each and every completed C&W access code call and toll free call placed from their payphones during the respective subsequent quarters.

38. On all Plaintiff independent payphone service providers’ payphone lines other than those described in Paragraphs 36 and 37 above, where C&W elected for the respective calendar quarter not to use the Bell Operating Companies’ average number of completed C&W access code calls and toll free calls as a surrogate number for the calls completed on Plaintiff independent payphone service providers’ payphones, C&W was required to pay Plaintiff

independent payphone service providers for each and every completed C&W access code call and toll free call placed from a Plaintiff independent payphone service provider's payphone since October 7, 1997.

39. Where C&W is responsible to pay Plaintiff independent payphone service providers for the actual number of completed C&W access code calls and toll free calls from Plaintiff independent payphone service providers payphone lines, C&W has failed, and continues to fail, to:

- a. accurately track the number of completed C&W access code calls and toll free calls that C&W carries from each payphone; and
- b. compensate Plaintiff independent payphone service providers for each actually completed C&W access code call and toll free call from Plaintiff independent payphone service providers' payphones.

40. In violation of Section 276 of the Act and the rules, regulations, and orders issued by the FCC, C&W has failed and continues to fail to fully and fairly compensate Plaintiff independent payphone service providers for each and every completed C&W intrastate and interstate call using a Plaintiff independent payphone service provider's payphone.

41. As a result of C&W's violation of the FCC's requirements, Plaintiff independent payphone service providers have been damaged through C&W's failure to pay Plaintiff independent payphone service providers for the total number of compensable calls that C&W is required to pay pursuant to the Act and the rules, regulations, and orders issued by the FCC.

42. Further, C&W has failed to make its compensation payments to the Plaintiff independent payphone service providers by the required due dates and owes Plaintiffs interest on the late payments.

43. Section 206 of the Act provides that in any case where a common carrier omits to do any act required of it, the common carrier “shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney’s fee to be fixed by the court in every case of recovery, which attorney’s fee shall be taxed and collected **as** part of the costs in the case.” 47 U.S.C. § 206.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

- a. Enter judgment in favor of Plaintiffs and against Defendant C&W on Count I;
- b. Order Defendant C&W, at its own expense, to provide Plaintiffs an accounting prepared by an accounting ~~firm~~ of Plaintiffs’ choice, of all compensable calls that C&W has carried since October 1, 1998, from each and every payphone owned by a Plaintiff, or by an independent payphone service provider which has assigned its claim for such compensation to a Plaintiff;
- c. Award damages to each Plaintiff in an amount equal to \$.238 due for each and every compensable call carried by Defendant C&W from October 1, 1998 to April 20, 1999, and in an amount equal to \$.24 for each and every compensable call carried by Defendant C&W from April 21, 1999 to present, from each and every payphone owned by a Plaintiff, or by an independent payphone service provider which has assigned its claim for such compensation to a Plaintiff, for which C&W has not yet paid Plaintiff independent payphone service **providers**;
- d. Award Plaintiffs 11.25% simple rate of interest on all required quarterly payments due Plaintiffs, and not timely paid, from the first day of the calendar quarter following

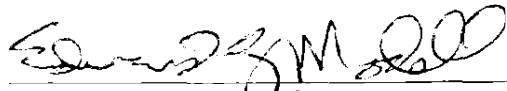
submission to C&W of the list of telephone numbers, or ANIs, of Plaintiffs' respective independent payphone service providers' payphones;

- e. Award Plaintiffs their costs of this action, including reasonable attorneys' fees as provided by law; and
- f. Grant such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs hereby request trial by jury for all issues so triable thereby.

Respectfully submitted,



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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2002, a copy of the foregoing Comments was delivered by first-class U.S. Mail, postage pre-paid to the following parties:

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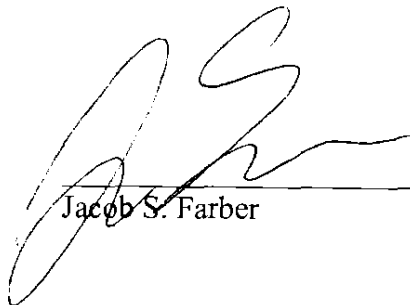
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